

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

SAFECO INSURANCE CO.,

Plaintiff,

v.

NO. 3:94CV156-S-D

JONATHON JESS CHAPPELL AND
ANDREW J. SUTHERLAND, III,

Defendants.

OPINION

This cause of action comes before the court upon plaintiff's motion for judgment on the pleadings and motion to strike defendant's supporting affidavits, as well as defendant's motion to strike plaintiff's affidavits. The general issue presented in this Declaratory Judgment action is whether a homeowner's insurance policy sold by the plaintiff, Safeco Insurance Company, provides coverage for injuries allegedly resulting from the insured defendant's intentional acts committed during a drunken street brawl. Because matters outside the pleadings were "presented to and not excluded by the court," Fed. R. Civ. P. 12(b), the motion is "treated as one for summary judgment and disposed of as provided in Rule 56...." Id.

Defendant Chappel asserts, inter alia, that the insurance policy's express provisions are irrelevant to this action because Safeco is estopped from contesting coverage. Therefore, he argues that Safeco must defend and possibly indemnify him in the underlying tort action brought by Sutherland. Case law sets forth

numerous circumstances in which an insurer may be estopped from denying coverage to its insured. See Arkwright-Boston Mfrs. Mutual Ins. Co. v. Aries Marine Corp., 932 F.2d 442, 445 (5th Cir. 1991) (presenting the paradigm estoppel situation); Campbell Piping Contractors v. Hess Pipeline Co., 342 So.2d 766, 770-71 (Ala. 1977) (explaining Alabama's rationale for requiring insurer to make reservation of rights).¹ To avoid such a situation, an insurer must reserve its right to contest coverage by advising the insured that although the company is presently undertaking the insured's defense, the company may later interpose a policy exclusion and deny coverage. Id. See Home Ins. Co. v. Rice, 585 So.2d 859, 861 (Ala. 1991). The insured is thereby on notice that his interests may be best protected by obtaining independent counsel. Alabama follows this general rule regardless of whether coverage actually exists under the policy. See Burnham Shoes, Inc. v. West American Insurance Co., 504 So.2d 238, 241 (Ala. 1987).

Safeco asserts that it timely reserved its right to contest coverage through a letter to Chappel dated September 8, 1993, shortly after the initial tort suit was filed. However, Chappel's supplemental affidavit stated that he had never received this letter, and therefore, Safeco was estopped from denying him a defense and indemnification in the action. Although Chappel's denial of the receipt of the letter was originally submitted in an

¹Both Alabama and Mississippi case law dictates that Alabama law governs the construction and application of the insurance policy in this action. See Maryland Casualty Co. v. Integrity Ins. Co., 693 F.2d 506, 508 (5th Cir. 1982); American Economy Ins. Co. v. Thompson, 643 So.2d 1350, 1354 (Ala. 1994).

inadmissible form, the court has accepted the supplemental affidavit in the interest of justice. Safeco's motion to strike the original affidavit is therefore denied because the issue of hearsay is now moot.

In regard to Safeco's motion for summary judgment, the court finds that Chappel's affidavit presents a genuine issue of material fact as to whether Safeco timely reserved its right to contest coverage. Although Alabama presumes a letter was received if it was properly addressed and postage was prepaid, this presumption is rebuttable and not conclusive. Republic Steel Corp. v. Gilbert, 83 So.2d 370, 372-73 (Ala.App. 1993). Thus, an admissible affidavit stating that a letter was not received creates a question for the trier of fact. Id. For this reason, the court must deny Safeco's motion for summary judgment.

Similarly, the denial of summary judgment renders the inadequate authentication of Sheila Erwin's affidavit irrelevant. The motion to dismiss pertaining to this affidavit is therefore denied.

An Order in accordance with this opinion shall be issued.

This the _____ day of November, 1995.

CHIEF JUDGE